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EXAMINER

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/477,936
Filing Date: January 05, 2000
Appellant(s): EMERSON ET AL.

MAILED

OCT 27 2004

GROUP 3600

Ernest D. Buff
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed July 13, 2004.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

The appellant's statement in the brief that certain claims do not stand or fall together is not agreed with because the grouping separates claims containing the same limitations. For example, Claim 7 is a system claim which performs the same steps as method Claim 1, and the two claims were finally rejected together. Likewise, method Claim 4 performs the same steps as system Claims 8 and 9. The Appellant has recognized these similarities in the Brief by arguing Claims 1 and 7 together (pages 6-

23), Claim 2 separately (pages 23-24), Claim 3 separately (pages 24-26), and Claims 4, 8, and 9 together (pages 26-29). Therefore, the Examiner recommends that the claim grouping of the final rejection be maintained as follows:

Group I: Claims 1 and 7

Group II: Claim 2

Group III: Claim 3

Group IV: Claims 4, 8, and 9

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

5,917,830	CHEN et al	6-1999
6,094,677	CAPEK et al	7-2000
5,155,591	WACHOB	10-1992

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-4 and 7-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chen et al (5,917,830) in view of Capek et al (6,094,677) and Wachob (5,155,591).

Claims 1 and 7: Chen discloses a system and method for substituting advertisements during a broadcast stream, comprising:

a. Generating, digitizing, and storing a plurality of replacement commercials (e.g. advertisements) for insertion into the broadcast stream (col 4, lines 39-41 and col 13, lines 15-20);

- b. Marking the broadcast with the start and end times (e.g. duration) of the commercial (col 2, lines 18-21; col 6, line 66 - col 7, line 10; and col 13, lines 15-20);
- c. Receive the broadcast stream (col 13, lines 57-62);
- d. Detect and read the insertion marker on the broadcast stream (col 6, lines 1-10 and col 12, lines 36-37);
- e. Select and substitute (insert) a replacement commercial into the broadcast stream at a point corresponding to the insertion marker (col 8, lines 1-5 and col 14, lines 3-12); and
- f. Repeat the detection and insertion of replacement commercials throughout the broadcast stream (col 13, line 61 - col 14, line 7).

While Chen uses a network television broadcast as an exemplary use of the invention, it is also disclosed that the invention can be applied "for splicing a secondary packetized data stream, such as a commercial, with a primary packetized data stream" (col 4, lines 7-9) and that the secondary packetized data streams (commercials) being inserted (spliced) "may include digital audio tapes" or "compact audio discs (CDS)" (col 4, lines 39-43) and that "audio only or data only messages may be inserted into the main packetized data stream" (col 4, lines 57-59). The Applicant's invention is directed to inserting a replacement commercial into a radio broadcast being received via the Internet. The Examiner notes that both radio and television broadcasts may be received via the Internet, and that both are "packetized data streams". Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made that the packetized data stream into which Chen is inserting commercials

could contain either audio/video data (i.e. television) or only audio data (i.e. radio). One would have been motivated to use Chen's system and method to insert commercials into a radio broadcast in view of his disclosure of inserting audio only data and storing digital audio tapes.

Chen discloses replacing main stream commercials with the selected commercials (col 14, lines 7-12) and also discloses marking and detecting the start and end times of the insertion points (T_{in} and T_{out} ; col 13, lines 15-20). Additionally, Chen discloses that "the system should avoid any discontinuity which results in a non-compliant data stream. The data stream should also preclude problems such as syntax violations, decoding errors, buffer overflow or underflow, timing recovery problems due to discontinuous time stamps, audio/video synchronization problems, and video display artifacts" (col 1, line 65- col 2, line 3). While it is not explicitly disclosed that a comparison is made to determine whether the duration of the replacement commercial corresponds to the duration of the main stream commercial being replaced (based on the start and end times), it is implied that such a comparison is being made in order to "avoid discontinuity" and "buffer overflow or underflow" and to ensure that the beginning of the replacement commercial(s) is at T_{in} and the end of the replacement commercial(s) is at T_{out} (col 14, lines 3-7). Capek discloses a similar system and method for inserting commercials into data streams containing content information which also determines whether the duration of the insertion point is sufficiently long to allow insertion of a commercial (col 4, lines 43-51; col 5, lines 23-28; and col 9, lines 57-61). This implies that the duration of each stored replacement commercial is known and

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used in the determination (comparison). Wachob also discloses a similar system and method for providing targeted advertisements to users with a cable television broadcast as an exemplary use of the invention. Wachob further explicitly discloses that the targeted advertisement would replace the original advertisement in the broadcast and be selected based on the determination of "the length of the impending commercial message break" (col 7, lines 34-37) based on received tag information which "defines if and when a commercial is about to occur, how long it will last" (col 7, lines 18-19). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to compare the durations of the main stream commercial and the replacement commercial when selecting the replacement commercial in the Chen invention. One would have been motivated to compare these durations in order to decrease the likelihood of "blank time" during the reception of the broadcast if the replacement commercial was shorter than the main stream commercial or "overwriting" of the main stream broadcast (content) if the replacement commercial was longer than the main stream commercial.

While Chen does not explicitly disclose using consumer demographics and preferences to select (target) the replacement commercial, Capek discloses that the information "may be customized to either the user or the material requested, or both" (col 4, lines 43-51 and col 8, lines 7-58) and that "the insertion manager 20 then selects a customized insertion based upon the client profile for the requesting client" (col 12, lines 32-39), or type of information requested (col 12, lines 34-39). Wachob also discloses selecting the targeted advertisement "based on the viewer's demographic

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characteristics" (col 2, lines 62-65). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to base the selection of the commercials in Chen upon how well it matches the consumer's demographic information and preferences. One would have been motivated to use this type of selection in Chen in order to present commercials which are more pertinent to the consumer ("to increase the users interest and to make the information more engaging", Capek, col 7, lines 8-10), thus increasing the acceptance and interaction with the commercial by the consumer.

Claim 2: Chen, Capek, and Wachob disclose a method and system for substituting advertisements during a broadcast stream as in Claim 1 above. Chen also discloses that the marking of the start and end times of the insertion point is performed by the broadcast station (col 6, line 66 - col 7, line 10 and col 13, lines 15-20).

Claim 3: Chen, Capek, and Wachob disclose a method and system for substituting advertisements during a broadcast stream as in Claim 2 above. Both Chen and Capek also disclose digitizing the audio stream into sequential packets to allow for presenting a series of packets in the proper order as one complete commercial (Chen, Fig. 6a, items A1-A11 and col 14, lines 56-65)(Capek, col 5, lines 14-16; col 7, lines 42-47; and col 8, line 59 - col 9, line 5).

Claims 4, 8, and 9: Chen, Capek, and Wachob disclose a method and system for substituting advertisements during a broadcast stream as in Claims 1, 2, 3, and 7 above. While Chen does not explicitly disclose using consumer demographics to select (target/match) the replacement commercial, Capek discloses that the information "may

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be customized to either the user or the material requested, or both" (col 4, lines 43-51 and col 8, lines 7-58) and that "the insertion manager 20 then selects a customized insertion based upon the client profile for the requesting client" (col 12, lines 32-39), or type of information requested (col 12, lines 34-39). Wachob also discloses selecting the targeted advertisement "based on the viewer's demographic characteristics" (col 2, lines 62-65). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to base the selection of the commercials in Chen upon how well it matches the consumer's demographic information. One would have been motivated to use this type of selection in Chen in order to present commercials which are more pertinent to the consumer ("to increase the users interest and to make the information more engaging", Capek, col 7, lines 8-10), thus increasing the acceptance and interaction with the commercial by the consumer.

(11) Response to Argument

(A) Independent claims 1-4 and 7-9 meet the conditions for patentability because neither Chen et al, Capek et al, nor Wachob, alone or in combination, teaches or suggests the interactive method for substituting replacement radio commercials of claim 1 or the interactive system for substituting broadcast commercial streams of claim 7.

The Appellant argues that Chen "is directed solely to insertions made in a digital video stream of the type used in a cable television system" (pages 6-7). The Examiner notes that while Chen has used a cable television system as an exemplary embodiment of his system, the invention as a whole is directed to inserting a secondary packetized

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data stream (such as a commercial) into a primary packetized data stream (such as a broadcast program). Chen further discloses that the secondary packetized data stream may include digital audio tapes, compact audio discs, etc. (col 4, lines 39-44). As noted in the final rejection, both television and radio broadcasts are packetized data streams with the only difference is the amount of data (i.e. amount of bandwidth being used) being transmitted through the network. The same steps for inserting (or replacing) content into the data stream have been used in both the radio and television industries for several decades by local stations to insert local advertising into nationally broadcast programs. Furthermore, if one looks at the claims in Chen, it will be noted that nowhere is the type of packetized data stream claimed to be only a video (television) data stream. What is claimed is "a method for splicing a secondary packetized data stream with a primary packetized data stream" (Claim 1 preamble). Therefore, the Examiner believes Chen renders it obvious that the claimed method could be used for any type of packetized data streams, to include both radio and television broadcasts.

The Appellant also argues that Chen does not disclose that the packetized data stream is delivered over the Internet (i.e. as an Internet Radio broadcast) and has no disclosure of "any reference whatsoever to any computer network" (pages 7-8). The Examiner notes many cable television systems (including the Examiner's) also offer Internet connections via the customer's cable television lines, thus becoming "Internet hosting services". Since Chen shows that the Video Information Providers (VIP)(i.e. cable television system) includes an Internet gateway 106 (see Figure 1) as the Appellant pointed out in his previous response, it is obvious that the Video Information

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User (VIU)(i.e. customer) could connect to and receive information, such as radio or television broadcasts, from the Internet through Chen's exemplary cable television system. This is made even more explicit by Chen's disclosure that the packetized data stream is ultimately delivered through the cable television network and displayed to the VIU "via televisions 170, 172 and/or personal computer 174" (col 5, lines 15-17). The Examiner also notes that, although argued by the Appellant (pages 10-11), there does not seem to be any bi-directional communication in the claimed invention other than the presumption that the customer has requested to view or listen to the desired program either by tuning to the proper channel or by connecting to the proper site online, which is also presumed to be the case in the cited references. Furthermore, as disclosed in Wachob, "Return paths for providing two-way communication between cable television headends and subscriber converters are well known in the art" (col 10, lines 40-42), and this was in 1989, over ten years before the Appellant filed the present application.

The Appellant continues the argument by noting that Chen requires "use of an elaborate infrastructure requiring specialized, dedicated hardware" (page 8), such as the "personal computer 174 may be connected to Digital Entertainment Terminal (DET) decoder 168", which "decodes a packetized data stream received via a coax distribution network", which is "fed by optical node unit 146", which supports conversion of information it received optically into electrical information as well as accomplishing the required modulation/demodulation". While this may sound complicated and require specialized, dedicated hardware, much of it reads directly on an Internet connection system. For example, in an Internet system, the consumer's personal computer is

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usually connected to the Internet Service Provide through a modem (either internal or external to the actual personal computer). This modem "supports conversion of information it received into electrical (digital) information and accomplishes the required modulation/demodulation. Indeed, the word "modem" is derived by the concatenation of the first three letters of modulate with the first three letters of demodulate (i.e. mod + dem = modem). This modem is connected through a distribution network (using coaxial, optical, or other cables) to the Internet Service Provider which provides the actual connection to the Internet (and the broadcasting station) through its server computers. Thus, an Internet System also requires an elaborate (but very similar) structure of specialized, dedicated hardware (e.g. modem, distribution network, and Internet Service Provider server computer) in order to provide content, such as online radio/television broadcasts, to the consumer.

The Appellant argues in reference to the differences in the required data rates between network broadcast delivery and the Internet-based system that Chen's system requires many megabits a second to operate on a cable television system, whereas the Appellant's Internet-based system can deliver audio and video at the modest rates of typical dial-up modems (page 9). The Examiner first notes that these limitations are not found in the claimed invention. Second, the Examiner notes that as the Internet technology has progressed through the years, the online delivery rates have approached the delivery rates of network broadcast delivery. As noted above, the Examiner has connected to the Internet through his cable television system for several years, thus achieving a data delivery rate many times that of the old dial-up modems

discussed by the Appellant. As new technology emerges, such as the recent debut of digital television lines, this data rate will even increase further and may equal or exceed the data delivery rate of 155.52 Mb/s cited by the Appellant. Thus, the data delivery rates has little effect on the claimed method steps or on the steps used by Chen.

The Appellant argues that the reference do not disclose determining the duration of the commercial break by comparing the length of the broadcast commercials with the lengths of the replacement commercials (pages 11-23). The Examiner notes that this has been discussed at length in the rejection above. Chen discloses replacing the packets in the main data stream with packets from the secondary data stream based on the start and end times (T_{in} and T_{out}) received from (embedded in) the main stream, and further discloses that in a series of replacement commercials “the beginning of the first commercial will correspond to T_{in}, and the end of the last commercial will end at T_{out}” (col 14, lines 3-7). This implies that the duration of the replacement commercial is being compared to the duration of time between T_{in} and T_{out}. Without such a comparison, Chen could not make the cited statement. Additionally, both Capek and Wachob also disclose determining the duration of the commercial opportunities. Wachob, in particular, explicitly discloses that the “tag information defines if and when a commercial is about to occur, how long it will last” and “the length of the impending commercial message break is determined from the tag information transmitted by the headend” (col 7, lines 18-20 and 34-36). Thus, contrary to the Appellant’s arguments, all three references allude to matching the duration of the inserted advertisement to the duration of the advertisement which is being replaced, i.e. the advertising opportunity.

Furthermore, as the Examiner has notes during the prosecution of this application, the broadcast media (both television and radio) have been using embedded tags in the broadcast data stream to indicate the start time and duration of commercial breaks in nationally broadcast programs since at least the 1960's. These tags are used by the local stations to insert local commercials or information (such as station identification) into the broadcast data stream by replacing one or more data segments of the broadcast (e.g. national commercials). In the claimed invention, the Internet hosting service is the equivalent of the local radio station in that it receives the broadcast data stream from the originating radio station and replaces the broadcast commercial with a "local" commercial.

The Appellant also argues by citing the Federal Circuit that the "references must be read as a whole and consideration must be given where the references diverge and teach away from the claimed invention....Moreover appellants cannot pick and choose among individual parts of assorted prior art references 'as a mosaic to recreate a facsimile of the claimed invention" and argues that the Examiner has used hindsight in order to reconstruct the invention (pages 18-22). The Examiner agrees that the whole of each reference must be considered, but disagrees that all of the individual parts of each reference must be compatibly combinable. Many times, even within a single reference, numerous alternative embodiments are disclosed which contain individual parts that are impossible or inane to combine with another embodiment's parts. For example, a bill paying system could contain one embodiment where the payer submits the payment via postal mail, another embodiment where the payer submits the payment

via the Internet, and another embodiment where the payer submits the payment through automatic electronic funds transfer from his bank to the payee's bank. This clearly shows that there are three alternative ways to submit the payment. However, it would not make any sense whatsoever for the payer to submit a payment using all three of the disclosed methods...one payment is sufficient. In the present application, the Examiner has used three references which present various ways to replace and/or insert desired commercials into a packetized data stream, either with or without demographic targeting. It would have been obvious to one having ordinary skill in the art at the time the invention was made to consider each of these references (and others) and to choose the preferred features of each, depending on the desires and goals of the system designer. Chen clearly shows determining *when* to insert the replacement commercial, but is not as clear as to how to select *which* commercial to insert. Capek and Wachob both disclose inserting commercials into a data stream, and also show which commercial to select based on the amount of time available for insertion (i.e. duration of commercial opportunity). While Capek may be using a different method to determine *when* to insert the commercial, it is Capek's method of determining *which* commercial to insert which is being combined with the Chen reference. Wachob, on the other hand, also shows a similar method as Chen in determining *when* to insert the commercial and also shows that the insertion determination (i.e. *which* commercial to insert) is based on the duration of the commercial opportunity and the demographics of the viewer (i.e. targeting the commercial). Thus, the three references are all attempting to solve a known problem of inserting a commercial into a broadcast data stream. The

Examiner notes that Appellant's argument that bodily incorporating Capek into Chen would render Chen inoperable because it would randomly insert commercials in the middle of broadcast content (e.g. a song) would be valid if one completely replaced all of the disclosure of Chen with Capek's disclosure, but then one would have the Capek patent, not the Chen patent.

Finally, the Appellant argues that the Wachob "system is thus much more cumbersome than the applicant's method" and, thus, the "applicant's system avoids the needless complication and wasted bandwidth inherent in any system wherein the selection is effected only at the communication node immediately connected to the user's television, computer, or similar device" (page 23). Again, the Appellant is not arguing the claimed subject matter, but the reasons why a person may select one type of delivery system over another. The Examiner notes that in the current invention the selection is being made by the Internet host system, which is the disparaged "communication node immediately connected to the user's television, computer, or similar device". Thus, it is not inherent that such a system would have needless complication and wasted bandwidth as asserted by the Appellant. If it was, then the Applicant's system would avoid and have needless complication and wasted bandwidth at the same time.

(B) Claim 2 (dependent from claim 1) meets the conditions for patentability because neither Chen et al, Capek et al, nor Wachob, either alone or in

combination, teaches or suggests the interactive method for substituting replacement radio commercials of claim 2.

The Appellant argues that since the references do not disclose all the features of the parent claim (Claim 1), Claim 2 is allowable even though Chen discloses marking the start and stop times by the broadcast station (page 24). The Examiner notes the above arguments in reference to the parent claim. As the Appellant has indicated, Chen does disclose that the broadcasting station marks the start and stop times of the commercial as in Claim 2.

(C) Claim 3 (dependent from claims 1 and 2) meets the conditions for patentability because neither Chen et al, Capek et al, nor Wachob, either along or in combination, teaches or suggests the interactive methods for substituting replacement radio commercials of claim 3.

The Appellant argues that Chen discloses high speed transmission of compressed MPEG video data, whereas the applicant's claim 3 requires the presence of an uncompressed low Internet speed audio stream (page 25). Again, the Appellant is arguing features not present in the claims. As discussed above, Chen discloses that the broadcast stream can be received by the user's cable television set or by the user's personal computer (col 5, lines 15-17). Also noted above, cable television service providers also provide high speed (broadband) Internet connections to their subscribers and are, thus, Internet Service Providers (Internet hosting services, in the Appellant's terminology). Furthermore, whether the customer is using a low speed dial-up Internet

connection or a high-speed Internet connection, such as through a cable modem or dedicated service link (DSL) telephone line, has no bearing on the steps of the claimed method. Indeed, the Examiner has personally found that using a low-speed connection usually results in very poor performance when connecting to an Internet Radio Service. It was common for me to experience 5-10 second blackouts in programming while the broadcast stream was spooled into my computer's buffers, then receive 20-30 seconds of audio, then another blackout, etc. The reference's use of high-speed connections is a much-needed and obvious improvement over the old slow-speed dial-up connections. As for the claimed packets bearing sequential serial numbers, the Examiner notes that this is well known in packet switching networks such as the Internet (see **packet** and **packet switching** on page 348 of the Microsoft Press Computer Dictionary, Third Edition). The dictionary defines **packet** as "2. *In packet-switching networks, a transmission unit of fixed maximum size that consists of binary digits representing both data and a header containing an identification number, source and destination addresses, and sometimes error-control data*" (emphasis added) and further defines **packet switching** as "A message-delivery technique in which small units of information (packets) are relayed through stations in a computer network along the best route available between the source and the destination. A packet-switching network handles information in small units, breaking long messages into multiple packets before routing. Although each packet may travel along a different path, and the packets composing a message may arrive at different times or out of sequence, the receiving computer reassembles the original message correctly. Packet-switching networks are considered

to be fast and efficient. To manage the tasks of routing traffic and assembling/disassembling packets, such a network requires some "intelligence" from the computers and software that control delivery. The Internet is an example of a packet-switching network. Standards for packet switching on networks are documented in the CCITT recommendation X.25" (emphasis added).

(D) Claim 4 (dependent from claim 1) and claims 8 and 9 (dependent from claim 7) meet the conditions for patentability because neither Chen et al, Capek et al, nor Wachob, either alone or in combination, teaches or suggests the interactive method for substituting replacement radio commercials of claim 4 or the interactive system for substituting broadcast commercial streams of an Internet radio program stream of claims 8 and 9.

The Appellant argues "that the inherently unidirectional nature of the Chen et al method and system inherently preclude the use of individualized customer demographics in the selection" (page 27). The Examiner notes that Chen's disclosure of an Internet gateway (Figure 1, item 106) and of delivering the first packetized data stream with the inserted secondary packetized data stream to the user's personal computer (Figure 1, item 174) explicitly encompasses bi-directional communications. As discussed above, the Examiner also notes that, although argued by the Appellant (pages 10-11), there does not seem to be any bi-directional communication in the claimed invention other than the presumption that the customer has requested to view or listen to the desired program either by tuning to the proper channel or by connecting to the proper site online, which is also presumed to be the case in the cited references.

Furthermore, as disclosed in Wachob, "Return paths for providing two-way communication between cable television headends and subscriber converters are well known in the art" (col 10, lines 40-42), and this was in 1989, over ten years before the Appellant filed the present application, thus Chen's example of using his invention on a cable television network also renders it obvious to have a bi-directional communications either through the exemplary cable television system or the person computer of the user. The Appellant's argument that the Wachob disclosure "of selecting advertising based on the viewer's demographics" using "a brute-force approach" (page 28) is once again arguing features not present in the claims. Claim 4 add to its parent claim the limitation of "*wherein the Internet hosting service maintains commercial type information for targeting ads to consumers, and user demographic information, and matches said user demographics and personal preferences to said commercial type for selecting a commercial targeted to said user*". Claims 8 and 9 add similar limitations using system terminology. Thus, the claims include two limitations: that the demographic of the consumer and the targeting criteria of the commercial are known (stored) and that a comparison between the two are made to select a commercial targeted to the user. First, this is the definition of targeted advertising. Second, as the Appellant noted, Wachob is "selecting advertising based on the viewer's demographics" and Capek "suggests insertions that may be customized to a user". Thus, both references imply that the system maintains the consumer's demographics and the targeting criteria of the commercials. Without maintaining (storing) both sets of data, it would be impossible to

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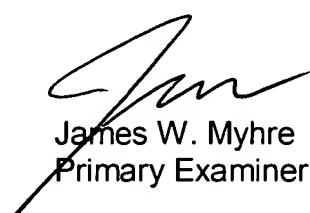
select advertising based on the viewer's demographics (Wachob) or to customize insertions to a user (Capek).

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


JWM

October 20, 2004


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